



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC SUIT NO. 114 OF 2017**

**JOHN GUCHU NJOROGE.....PLAINTIFF**

**VERSUS**

**MBOI KAMITI FARMERS COMPANY LIMITED.....DEFENDANT**

**JUDGMENT**

By a *Plaint* dated 22<sup>nd</sup> October 2010, the Plaintiff herein brought a claim against the Defendant and sought for the following orders against the Defendants:-

a) *A declaration that the defendant as at 2007 held legal title in respect of the following properties as a trustee for the Plaintiff,*

- |                             |                             |
|-----------------------------|-----------------------------|
| 1. Ruiru/ Kiu Block 4/1681  | 11. Ruiru/ Kiu Block 4/1698 |
| 2. Ruiru/ Kiu Block 4/1682  | 12. Ruiru/ Kiu Block 4/1700 |
| 3. Ruiru/ Kiu Block 4/1685  | 13. Ruiru/ Kiu Block 4/1702 |
| 4. Ruiru/ Kiu Block 4/1690  | 14. Ruiru/ Kiu Block 4/1704 |
| 5. Ruiru/ Kiu Block 4/1692  | 15. Ruiru/ Kiu Block 4/1705 |
| 6. Ruiru/ Kiu Block 4/1693  | 16. Ruiru/ Kiu Block 4/1707 |
| 7. Ruiru/ Kiu Block 4/1694  | 17. Ruiru/ Kiu Block 4/1710 |
| 8. Ruiru/ Kiu Block 4/1695  | 18. Ruiru/ Kiu Block 4/1712 |
| 9. Ruiru/ Kiu Block 4/1696  | 19. Ruiru/ Kiu Block 4/1713 |
| 10. Ruiru/ Kiu Block 4/1697 | 20. Ruiru/ Kiu Block 4/1715 |
| 21. Ruiru/ Kiu Block 4/1730 | 36. Ruiru/ Kiu Block 4/1828 |
| 22. Ruiru/ Kiu Block 4/1743 | 37. Ruiru/ Kiu Block 4/1890 |
| 23. Ruiru/ Kiu Block 4/1713 | 38. Ruiru/ Kiu Block 4/1891 |
| 24. Ruiru/ Kiu Block 4/1715 | 39. Ruiru/ Kiu Block 4/1928 |
| 25. Ruiru/ Kiu Block 4/1744 | 40. Ruiru/ Kiu Block 4/1930 |
| 26. Ruiru/ Kiu Block 4/1748 | 41. Ruiru/ Kiu Block 4/1969 |

27. Ruiru/ Kiu Block 4/1766      42. Ruiru/ Kiu Block 4/1995
28. Ruiru/ Kiu Block 4/1767      43. Ruiru/ Kiu Block 4/2014
29. Ruiru/ Kiu Block 4/1785      44. Ruiru/ Kiu Block 4/2031
30. Ruiru/ Kiu Block 4/1787      45. Ruiru/ Kiu Block 4/2035
31. Ruiru/ Kiu Block 4/1790      46. Ruiru/ Kiu Block 4/2050
32. Ruiru/ Kiu Block 4/1791
33. Ruiru/ Kiu Block 4/1799
34. Ruiru/ Kiu Block 4/1801
35. Ruiru/ Kiu Block 4/1802

**b) An Order of injunction restraining the Defendant whether by itself, members, servants, employees, agents, assignee or any party claiming under them from trespassing entering, alienating, dealing, charging, transferring, interfering with the Plaintiff quiet possession or otherwise in any manner whatsoever dealing with of the aforesaid parcel of land.**

**c) An Order directing the Defendant to sign and deliver all documents necessary to transfer the properties enumerated herein above to the Plaintiff.**

**d) An Order directing that the said properties be transferred to the Plaintiff.**

**e) Costs of the suit.**

**f) Any other or further relief as this Honourable Court may deem fit to grant.**

In his statement of claim, the Plaintiff averred that as at 2007, the Defendant owed him over **Kshs.2,990,000/=** and upon demand, the parties entered into **Agreement** dated **17<sup>th</sup> July 2007**, in which the Defendant agreed to transfer to the Plaintiff in full and final settlement of the said debt for the **46 parcels** of land.

He averred that in furtherance of the agreement, the Defendant gave him possession of the properties pending issuance and registration of the leases and formal transfer as the formal leases were still processed by the Commissioner of Lands and executed an irrevocable power of attorney in his favour to enable him execute all necessary documents to effect the transfer in his favor or his nominee. This thereby transferred all its interests in the said properties and its holding the legal documents in trust for the Plaintiff.

He averred that the processing commenced and he met the costs in respect of land rent, conveyancing fees, registration fees and stamp duty and some leases were processed and released to him. However, in **May 2010**, the processing of the leases was stopped and upon inquiry, he ascertained that the Defendant had instructed the **Commissioner of Lands** to stop further processing of the leases with no justification. He further averred that around **October 2010**, the Defendant offered for sale the said properties. It was his contention that the Defendant having transferred all interests to him, any purported sale **after 2007**, is **fraudulent** and **illegal** as the Defendant is holding the properties in trust for him and has no power to alienate or deal with the properties and therefore its acts are unlawful and unless restrained, the Defendant may proceed to pursue the processing of the leases in its name and transfer the properties to third parties.

The suit is contested and the Defendant filed its **Defence** dated **19<sup>th</sup> August 2011**, and denied all the allegations made in the **Plaint** and averred that the **Plaint** is **bad in law** and does not demonstrate any cause of action and further denied selling the said properties to the Plaintiff. It was their contention that there was no such an amount due and owing to the Plaintiff and averred that the alleged sale was fraudulently done by the Plaintiff in collusion with the unnamed **Executive Chairman** and the **Secretary** of the Defendant and there was no **Board Resolution** made in compliance with its **Memorandum and Articles of Association**.

After various Applications, the matter was finally set down for hearing and on **9<sup>th</sup> November 2017**, wherein the Plaintiff called one witness. The Defendant did not appear in Court despite numerous opportunities to appear and therefore did not call any witness and the Plaintiff proceeded and closed his case.

#### **Plaintiff's Case**

**PW1 - John Guchu Njoroge** the Plaintiff herein adopted his witness statement dated **28<sup>th</sup> November 2014**, and produced his list of documents as exhibits. It was his testimony that the Defendant gave him special powers of Attorney. He stated that there was a **Sale Agreement** and he paid fees for the parcels of land.

It was his evidence that he found building materials on the ground and he then went to court and was issued with injunction orders. He was later issued with letters of allotment which he produced as evidence and marked as exhibit. He testified that he had bought some land before from the Defendant being **Nginda/Samar/Block 2/10** and **2/12**, and the two were transferred and registered in the name of **Catherine**

**Wambui Guchu**, his daughter and he was issued with the title document. He produced his *Supplementary List of Documents* as exhibits.

He further testified that after titles were issued, **Ruth Wangare Kariuki**, came and claimed ownership of the land and sued them at **Murang'a Chief Magistrate's Court**. The Defendant then asked him to surrender the land and in turn the Defendant would give him a plot in **Githurai** to which he accepted and a **consent** was entered settling the matter. He produced the stated Consent as exhibit. He also testified that new titles were issued to **Mboi Kamiti Farmers Company Limited** and they were indicated as exchange issue. It was his evidence that the Green card in respect of the two parcels of land shows the history of registration of **Nginda/Samar/210** and he produced them as exhibits. It was his further evidence that the Defendant was to transfer the **Ruiru/Kiu Block 4**, but he did not get titles though he paid land rates for the parcels of land.

It was his evidence that he paid for the fees for the titles but the titles were never processed. He then wrote to the Defendant to process the titles and not all were released to him. He was later informed that the Defendant had instructed the Commissioner of Lands not to release to him the titles and therefore transfers have not been effected. It was his further evidence that he dealt with the Directors of the Company and produced the further exhibits. He urged the court to grant his prayers.

On **13<sup>th</sup> December 2017**, this Court directed the Plaintiff to file written submissions and in compliance with the said direction, the Plaintiff through its Advocates **Njuguna & Partners**, filed his written submissions dated **1<sup>st</sup> March 2018** and filed on **5<sup>th</sup> March 2018**. It was submitted that the Defendant transferred its interest in the suit properties when it signed the **Sale Agreement** with the Plaintiff and its intention to create a trust in favour of the Plaintiff was clear and it is necessary for court to presume a trust and therefore the Plaintiff is entitled to the reliefs sought. He relied on various decided cases amongst them the case of **Bishan Singh Chadha Ltd...Vs...Mohinder Singh & Another (1956)29 KLR 20**, where the Court stated that:-

**“Where property is transferred to one person for a consideration paid or provided by another person and that other person and that other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing consideration.”**

The Court was therefore urged to grant the Orders sought.

The Court has now carefully read the pleadings and the submissions and evidence adduced and considered the same. In my view the issues for determination before this Court are:-

- a) **Whether the Power of Attorney was irrevocable.**
- b) **Whether the sale agreement was valid.**
- c) **Whether or not the Defendant was holding the suit properties in trust for the Plaintiff.**
- d) **Is the Plaintiff entitled to the prayers sought?**
- e) **Who is to bear costs of the suit?**

I would like to first point out that the Defendant despite service and knowledge of the hearing dates did not appear to give evidence. I have noted that there is a defence on record however without a witness appearing before Court, the Defence remains just facts that have not been substantiated and the evidence of the Plaintiff remains uncontroverted. See the case of **Charter Bank Limited...Vs...Frank N. Kamau (2016)eKLR**, where the Court stated that:-

**“It is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statement of facts since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and unchallenged.”**

However this Court has an obligation to look into the evidence that has been adduced by the Plaintiff and ensure that the facts and allegations by the Plaintiff have been proved on a balance of probabilities.

- a) **Whether the Power of Attorney was irrevocable.**

The Plaintiff gave evidence to the effect that the Defendant gave him a power of Attorney in respect of the suit property and the said Power of Attorney was produced as exhibit. The Defendant has not challenged the said Power of Attorney and in failing to do so the Court finds that the same is valid.

To the best of my knowledge there has been no revocation of the said Power of Attorney. Further even if there was to be a revocation, the Court must consider whether the same was revocable. A Power of Attorney lapses for legal reasons and there are elements which must exist before a Power of Attorney can be said to be irrevocable. If it is given for valuable consideration meaning that something of value is given and it is stated in it that it is irrevocable then that power of Attorney is said to be irrevocable and therefore the Principal cannot revoke it. **Blacks Law Dictionary, 8<sup>th</sup> Edition** defines '**A Power of Attorney**' as;

**“A power to do some act, conveyed along with an interest in the subject matter of the power. A power with an interest is not held for the benefit of the Principal and it is irrevocable due to the agents' interest in the subject property.”**

In the case of CCB...Vs...MIB & Another (2014)eKLR, the Court stated:-

***“An irrevocable Power of Attorney will not lapse because it is continuing (enduring) and irrevocable, cannot be cancelled. An irrevocable power of Attorney must say that it is irrevocable and it must be given for valuable consideration”.***

This Court therefore finds that the Power donated to the Plaintiff was an irrevocable having been given the Power of Attorney for valuable consideration, coupled with interest and clearly stating that it is irrevocable. With the above in mind, the Court finds that the only person who then from *the 25<sup>th</sup> July 2007*, the date in which the Power of Attorney was signed, who had powers to deal with all transactions pertaining to the suit property was the Plaintiff and the Defendant could not revoke it nor could it purport to transfer the suit lands.

***b) Whether the sale agreement was valid.***

The Plaintiff's position in this matter is that he had bought some suit land from the Defendant being *LR. Nginda/Samar/Block 2/12 and 2/10*, thereafter there was a complaint with regard to the suit properties and the parties entered into an agreement in which it was agreed that the Defendant would transfer the suit properties to the Plaintiff and this was documented in a resolution dated *5<sup>th</sup> June 2007*, in which the Directors of the Company unanimously agreed to compensate the Plaintiff with the suit properties. This was done in exchange of the Plots in *Nginda*. The resolutions have been certified and bears the letter head of the Defendant and though the Defendants in their Defence claimed that the Directors that signed the documents are not the genuine Directors, there is no evidence that has been provided to this effect. The Court therefore finds no reason why it should not believe that there was a valid resolution by the Defendant to transfer the suit properties to the Plaintiff.

A sale agreement evidencing that there was a sale transaction between the parties has been produced. **Section 3(3)** of the Contract Act states as follows:-

***“No suit shall be brought upon a contract for the disposition of an interest in land unless—***

***(a) the contract upon which the suit is founded—***

***(i) is in writing;***

***(ii) is signed by all the parties thereto; and***

***(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:***

***Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.***

Further the Agreement for sale contains the names of the parties, the description of the property, the purchase price and the conditions thereto. A look at the said sale agreement confirms that the same is a valid sale agreement which is enforceable by the parties. See the case of Nelson Kivuvani... Vs... Yuda Komora & Another, Nairobi HCCC No.956 of 1991, where the Court held that:-

***“The agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”.***

All the above ingredients are met in the instant **Sale Agreement** entered between the Plaintiff and the Defendant and therefore the **Sale Agreement** between the two is **valid**.

***c) Whether or not the Defendant was holding the suit properties in trust for the Plaintiff.***

Trusts can be created expressly but can also be created informally or implied. A proprietor holds land subject to any trust. The Defendant in this instance is the registered proprietor of the suit lands. Considering the circumstances that have been discussed above, having concluded that the power of Attorney was irrevocable and noting the contents of the sale agreement and finding that it is valid, it is the Court's opinion that the parties intention was very clear that the Defendant would transfer the suit properties to the Plaintiff and therefore their intention was that from the date of the Power of Attorney the defendant would be holding the properties in trust for the Plaintiff.

The Court notes that **Section 25** of the Land Registration Act provides for the rights of a proprietor. It provides that;

***“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to;***

***a) to the leases, charges and other encumbrances and to the conditions and to the conditions and restrictions if any, shown in the register and to such;***

b) liabilities, rights and interests as affect 6the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

In the case of Rose Naswa Masinde...Vs...Lillian Nekesa Simiyu (2014) eKLR, the Court stated that:-

**“I am inclined to believe the version of the plaintiff that the suit land was to be held by the defendant, on the understanding that she will later transfer the same to her sister in law, Victoria Masinde. That is why there was prepared a transfer instrument from the defendant to Victoria Masinde. In as much as the transfer instrument is undated and unattested, such that it cannot be of any utility in transferring the interest of the defendant, that instrument goes to demonstrate the intention of the parties, which was that the defendant would hold the property on behalf of Victoria, and at the opportune time, transfer the property to Victoria. A trust can, and will be implied in order to give effect to the intention of the parties.”**

With the foregoing, it is the Court’s opinion that the Defendant was holding the suit properties in trust for the Plaintiff. The Court having made a finding that the parties entered into a valid sale agreement in which the Defendant was to transfer the suit properties to the Plaintiff and further went ahead and donated the Power of Attorney to the Plaintiff, that was irrevocable there was always an intention that the suit property belonged to the Plaintiff and ought to be transferred to him.

**d) Is the Plaintiff entitled to the prayers sought?**

The Court has considered the Plaintiff’s claim wherein he has sought for various prayers among them an **Order directing the Defendant to sign and deliver all documents necessary to transfer the properties enumerated in the claim** by the Plaintiff. The Plaintiff had averred that the Defendant did transfer the above stated parcels of land in exchange for land parcels **Nginda/Samar Block 2/10** and **Nginda/Samar Block 2/12**. The Plaintiff did produce exhibits to support his claim.

The Defendant in its Defence has denied the allegations made by the Plaintiff and contended that the alleged sale was fraudulently done by the Plaintiff in collusion with the **unnamed Executive Chairman** and **Secretary** of the Defendant.

It is trite that ‘**he who alleges must prove**’. **Section 107** of the **Evidence Act** is also very clear on the above stated claim. It states:-

**“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.**

The Plaintiff alleged that the Defendant did sell the enumerated plots to him. He produced documents and exhibits to support his claim. However, the Defendant did not appear in court to challenge the Plaintiff’s evidence even after having been granted several opportunities to do so. Therefore the Plaintiff’s evidence remains uncontroverted and this Court finds no reason to doubt the same.

Therefore, the Court finds that the Plaintiff herein has discharged his duty of proof of his case on the required standard of balance of probabilities and consequently, the Court finds that the Plaintiff is entitled to the prayers sought in his **Plaint**.

**e) Who is to bear costs of the suit?**

Ordinarily costs do follow the event. Even though **Section 27** of the **Civil Procedure Act** provides that costs are awarded at the discretion of the court, the Court finds that costs are mostly awarded to the successful litigant. The **Plaintiff herein is the successful litigant and he is therefore entitled to costs of this suit**.

Having now carefully considered the pleadings herein, the exhibits produced in court, the written submissions, the cited authorities and the relevant provisions of law, the **Court finds that the Plaintiff has proved his case on the required standard of balance of probabilities. Consequently, the Court enters Judgment for the Plaintiff against the Defendant as prayed in the Plaint in terms of prayers No.(a), (b), (c) (d) and (e).**

It is so ordered.

**Dated, Signed and Delivered at Thika this 22<sup>nd</sup> day of March 2019.**

**L. GACHERU**

**JUDGE**

**22/3/2019**

In the presence of

Mr. Kithiri holding brief for Mr. Njuguna for Plaintiff

No appearance for Defendant

Lucy - Court Assistant

**Court** – Judgment read in open court in the presence of the above advocate and absence of the Defendant and its advocate.

**L. GACHERU**

**JUDGE**

**22/3/2019**